No. 86-666

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WHITWORTH BROS. STORAGE COMPANY,
Cross-Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CROSS-RESPONDENTS' BRIEF IN RESPONSE

KAREN I. WARD
(Counsel of Record)
Associate General Counsel
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
8550 West Bryn Mawr Avenue
Chicago, Illinois 60631
(312) 693-5300

BERNARD S. GOLDFARB
MARK V. WEBBER
GOLDFARB & REZNICK
Suite 1800
55 Public Square
Cleveland, Ohio 44113
(216) 781-0383
Attorneys for Cross-Respondents

(Counsel continued on Inside Cover)

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

Of Counsel:
JOHN E. BARDGETT, General Counsel
CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND
8550 West Bryn Mawr Avenue
Chicago, Illinois 60631
(312) 693-5300

QUESTIONS PRESENTED FOR REVIEW

1. Within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.*, can an "employer" ever be a "participant" and thus entitled to bring an action under ERISA § 502(a), 29 U.S.C. § 1132(a)?

2. Did Congress in § 403(c)(2)(A)(ii) of ERISA, 29 U.S.C. § 1103(c)(2)(A)(ii), imply that an employer may bring an action for restitution of contributions made, allegedly by mistake, to an ERISA-governed multiemployer employee benefit plan?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 86-666

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WHITWORTH BROS. STORAGE COMPANY,
Cross-Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Cross-Respondents.

CROSS-RESPONDENTS' BRIEF IN RESPONSE

The cross-respondents Central States, Southeast and Southwest Areas Pension Fund ("the Pension Fund"), the Pension Fund's Board of Trustees and Executive Director (all cross-respondents hereinafter collectively "Central States") respectfully submit this Brief in Response to the Cross-Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

On September 15, 1983, Whitworth Bros. Storage Company ("Whitworth") filed a complaint against Central States seeking a refund of certain contributions made, allegedly by

mistake, by Whitworth to the Pension Fund and a declaratory judgment that unpaid contributions were not owed by Whitworth. Specifically, Count I of the complaint alleged a right pursuant to § 403(c)(2)(A)(ii) of ERISA, 29 U.S.C. § 1103(c)(2)(A)(ii), to recover contributions made by Whitworth to the Pension Fund on behalf of William Whitworth and Ernest Whitworth after the effective date of ERISA; Count II was an allegedly pendent state-law claim for restitution of Whitworth's contributions for William Whitworth and Ernest Whitworth prior to the effective date of ERISA; Count III sought a declaratory judgment pursuant to 28 U.S.C. § 2201 that Ernest Whitworth is not covered by the collective bargaining agreement providing for contributions to the Pension Fund, that Whitworth is entitled to restitution plus interest of the payments made on Ernest Whitworth's behalf, and that Central States is not entitled to recover the unpaid contributions.

On November 6, 1984, Central States filed a motion, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the complaint for lack of subject-matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted. The "facts" to be considered upon such a motion, and upon review of a decision granting such a motion, are the factual allegations pleaded in the complaint. The following relevant factual allegations from the complaint (some of which Central States denies, but which for the purposes of review must be deemed to be true), therefore, are the "facts" in this case:

> Plaintiff is and was, at all relevant times herein, a corporation duly organized and existing under the laws of the State of Ohio. (Complaint at ¶ 1)
>
> The Defendant Central States, Southeast and Southwest Areas Pension Fund (hereafter Central States or Pension Fund) is an employee benefit plan and multiemployer plan, as defined in 29 U.S.C. § 1002(2), (3) and (37)(A), established and maintained by "employers" engaged in "commerce" and in an "industry and activity

affecting commerce", and by an "employee organization" representing employees engaged in "commerce" and in an "industry and activity affecting commerce", within the meaning of 29 U.S.C. §§ 1002(4), (5), (11), (12) and 1003(a). Defendant Central States has maintained a Pension Fund for the benefit of Teamsters Union members from 1955 to the present. (Complaint at ¶ 2)

From 1955 to the present, William Whitworth was and is a co-owner, employee and officer (with authority to hire and fire employees) of Plaintiff Whitworth Bros. Storage Company. From 1955 to the present, Ernest Whitworth was and is a co-owner, employee and officer (with authority to recommend hiring and firing employees) of Plaintiff Whitworth Bros. Storage Company. (Complaint at ¶ 6)

Plaintiff made employer contributions to Central States for William Whitworth from January 1, 1975 through March, 1980, and for Ernest Whitworth from January 1, 1975 through July, 1981 in the mistaken belief that William Whitworth and Ernest Whitworth were employees covered by the collective bargaining agreement. The amount of said contributions is approximately $11,000.00. (Complaint at ¶ 10)

Plaintiff demanded recovery of such contributions to Central States. (Complaint at ¶ 11)

On July 23, 1981, Defendant Board of Trustees denied Plaintiff's request for recovery of erroneous contributions made on behalf of William Whitworth from January 1, 1975 through November 10, 1979. On July 24, 1981, Defendant Board of Trustees approved Plaintiff's request for recovery of erroneous contributions made on behalf of William Whitworth from November 11, 1979 through March 1, 1980. (Complaint ¶ 12)

From 1955 through December 31, 1974, Plaintiff made contributions to Central States for William Whit-

worth and Ernest Whitworth in the mistaken belief that William Whitworth and Ernest Whitworth were employees covered by the collective bargaining agreement. The amount of such contributions is approximately $9,000.00. (Complaint at ¶ 19)

Plaintiff has demanded recovery from Defendants of the erroneous payments for this period, but Defendant Board of Trustees has refused to review Plaintiff's claim for erroneous contributions from 1955 through May 30, 1964. On July 23, 1981, Defendant Board of Trustees denied Plaintiff's claim for recovery of erroneous contributions made on behalf of William Whitworth from May 31, 1964 through December 31, 1974. (Complaint at ¶ 20)

From August, 1981 through May, 1983, Defendant Central States billed Plaintiff in the amount of $1,701.86 purportedly for Plaintiff's employee's contribution for Ernest Whitworth. Plaintiff has refused to pay Central States because Ernest Whitworth is not covered by the collective bargaining agreement. (Complaint at ¶ 26)

After briefing on the motion was complete, the district court filed a memorandum and order on January 15, 1985, stating that "Jurisdiction is predicated on 28 U.S.C. § 1331 and 29 U.S.C. § 1132e(1) [sic: (e)(1)] and (f)," noting that "[t]he issue in the case at bar is whether an employer may bring an action to recover overpayments to a pension fund," concluding that "employers have no cause of action," and therefore dismissing the counts alleging federal claims for lack of jurisdiction over the subject matter, and the pendent state-law claim as a matter of discretion. Pursuant to that memorandum and order, the complaint was dismissed on January 22, 1985.

On February 1, 1985, Whitworth filed a motion for reconsideration and to alter or amend the judgment as well as a motion for leave to file a first amended complaint. After the completion of briefing on these motions, the district court

filed a memorandum and order denying both motions on March 11, 1985.

Whitworth filed a notice of appeal to the Court of Appeals for the Sixth Circuit on March 26, 1985. After briefing and oral argument, the court of appeals filed its opinion on June 25, 1986. In that opinion, the Sixth Circuit considered "whether the district court had jurisdiction of such a claim [by an employer for restitution of contributions made, allegedly by mistake, to an employee benefit plan] based on (1) the express actions recognized in ERISA; (2) an action implied from the terms of the statute; or (3) an action arising under federal common law." 794 F.2d at 224. The court of appeals answered the first two of these questions in the negative, holding that "section 502 is an exclusive grant of jurisdiction, and that ERISA does not expressly provide for an action by an employer against a fund for a refund of contributions," and that an employer has "no implied right of action pursuant to section 403." *Id.* at 228, 233. The Sixth Circuit went on, however, to characterize Whitworth's restitution claim as a "contract claim" and to hold that such a claim is governed by federal law because ERISA § 514(a), 29 U.S.C. § 1144(a), preempts state law relating to employee benefit plans and because the legislative history of ERISA indicates a congressional intent to develop a federal common law of such plans. *Id.* at 233-235. Based upon this holding, the court of appeals concluded that Whitworth's action for restitution is governed by federal common law and "arises under" federal law for the jurisdictional purposes of 28 U.S.C. § 1331. *Id.* at 236.

ARGUMENT

The first question presented by Whitworth was neither raised nor considered in either of the courts below. This Court ordinarily does not decide questions presented under such circumstances. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). Moreover, Whitworth's assertion that an "employer" should be considered a "participant" for the purpose of bringing suit under ERISA § 502(a), 29 U.S.C. § 1132(a), is completely without merit. Whitworth has been unable to cite any case in favor of this proposition and thus bases its argument upon the assertion that "the employer is suing on behalf of the employees for whom it contributes money to obtain for them the benefit of the return of money to which they are entitled." Cross-Petition at pages 12-13. However, such a representational relationship between an employer and its employees can hardly be deemed typical[1]; moreover, no such relationship was alleged in the complaint in the present case.

In any event, an examination of ERISA's relevant definitions, which Whitworth failed to mention in its argument, demonstrates that Whitworth cannot be a participant.

> The term "participant" means any employee or former *employee of an employer*, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an

---

[1] Analysis of the suggestion that an employee benefit plan should "simply refund[] the mistaken monies in exchange for its release from the obligation to pay a pension," Cross-Petition at page 28, illustrates the invalidity—and, in fact, the danger—of Whitworth's argument when applied to normal circumstances where there is not an identity between an employer's owners and its employees. The suggested refund would be made to an *employer*, while any entitlement to a pension is that of an *employee*. Apparently Whitworth either believes that the suggested release would eliminate such an entitlement, or else that employees will waive their pension rights for the benefit of their employers; the latter is, of course, sheer speculation that runs contrary to common sense and experience, and the former is contrary to law.

> employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ERISA § 3(7), 29 U.S.C. § 1002(7) (emphasis added). An "employee" is defined as "any *individual* employed by an employer," ERISA § 3(6), 29 U.S.C. § 1002(6) (emphasis added); thus a corporate employer such as Whitworth can never be considered as a participant.[2]

With regard to the second question, Central States acknowledges that a conflict of decisions exists among the federal judicial circuits on the issue of whether an employer has an implied right of action under ERISA § 403(c)(2)(A)(ii)[3]. Indeed, in footnote 2 of its Petition for a Writ of Certiorari in the present case, Central States pointed out that conflict. Even though this issue was not the basis of the Sixth Circuit's decision in the present case, Central States would not object to this Court's review of Whitworth's second question in conjunction with a review of the question presented by Central States in its Petition in Case No. 86-481 — whether an employee has a federal-common-law action for restitution of contributions made, allegedly by mistake, to an ERISA-governed employee benefit plan — which was the basis for the decision below. Central States maintains, however, that Whitworth's position on the merits of its second question is without merit for the reasons stated by the Sixth Circuit in Section II.B. of its opinion in the present case.

---

[2] ERISA § 3(5), 29 U.S.C. § 1002(5), defines the term "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

[3] Whitworth either confuses or simply misstates the issue when it argues that a cause of action should be implied because "§ 403(c)(2)(A)(ii) expressly provides a remedy. . . ." Cross-Petition at page 26; *see also* pages 21 and 25.

Respectfully submitted,

KAREN I. WARD
(Counsel of Record)
Associate General Counsel
CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS
PENSION FUND
8550 West Bryn Mawr Avenue
Chicago, Illinois 60631
(312) 693-5300

BERNARD S. GOLDFARB
MARK V. WEBBER
GOLDFARB & REZNICK
Suite 1800
55 Public Square
Cleveland, Ohio 44113
(216) 781-0383
Attorneys for Cross-Respondents

Of Counsel:
JOHN E. BARDGETT, General Counsel
CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND
8550 West Bryn Mawr Avenue
Chicago, Illinois 60631
(312) 693-5300